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IN THE

SUPREME COURT OF THE UNITED STATES

1949 TERM

BEN L. BEETS, PETITIONER,

vs.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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To the Honorable The Chief Justice and The Associate Justices of the Supreme Court of the United States:

This petitioner, Ben L. Beets, petitions the Honorable Court for a Writ of Certiorari to the Court of Appeals, Tenth Circuit, and for the review by the Honorable Court of the judgment and opinion of the Court of Appeals in its Case No. 3886, *Walter A. Hunter,* Warden of the United States Penitentiary, *Appellant, vs.* this petitioner,

Appellee, wherein the judgment of the District Court discharging this petitioner from custody of Respondent was reversed without a ruling on the merits and this petitioner relegated to a temporary administrative remedy.

OPINIONS BELOW.

The judgment and opinion of the Court of Appeals was entered February 2, 1950, and is contained in the Transcript at pages 201 to 203. Trial in the District Court was before Circuit Judge Alfred P. Murrah, and his ruling in open court is contained in the Transcript, pages 138 to 140, and his Findings and Conclusions subsequently made, Transcript, pages 20 to 24.

JURISDICTION.

Jurisdiction of the Supreme Court is invoked under Judicial Code Title 28, Sections 1254, 2101, and 1251; and Ex Parte Bollman, 4 Cranch 75.

SUMMARY OF CASE.

Petitioner was an American combat soldier with the Third Armored Division in Germany. His home is Chickasha, Oklahoma. On April 3, 1945, at Dahl, Germany, there was an alleged rape committed against a German woman, Wilma Ley, a doctor of medicine. Petitioner and another soldier were charged jointly with the offense. Their court-martial trial was at Darmstadt, Germany, June 1, 1945, resulting in their conviction and sentence to life imprisonment, forfeiture of all rights, etc. Sentence subsequently reduced to 18 years. While

imprisoned at the United States Penitentiary, Leavenworth, Kansas, petitioner filed habeas corpus petition in the Federal Court and hearing was had January 21 and 22, 1948, resulting in a judgment discharging petitioner from custody, and as hereinafter more fully discussed.

Petitioner, Ben L. Beets, was discharged by the judgment of the United States District Court entered *January 22, 1948.* The respondent warden filed notice of appeal *February 24, 1949.* On *February 1, 1949,* the new Articles of War became effective (62 Stat. 627; 10 U. S. Code, Secs. 1472 to 1593). New Article 53 (10 U. S. C. 1525), referring to conviction and sentence by an Army Court-Martial, provides that a Petition for new trial, vacation of sentence and for restoration of rights may be presented to the Judge Advocate General, and that the final action of the Judge Advocate General thereon—

> "shall be binding upon all departments, courts, agencies, and officers of the United States."

The Court of Appeals, Tenth Circuit, did not rule upon the merits of the case, but reversed and remanded Petitioner to the administrative remedy provided in Article 53. (See Opinion, T. 201)

Habeas corpus proceedings and the evidence resulting in Decree discharging petitioner from custody is contained in the Transcript, pp. 86 to 140. At pages 138-140 is found the ruling by Judge Murrah discharging petitioner. Following this ruling in open court, Judge Murrah made Findings and Conclusions.—T. 20-25.

Witnesses who gave sworn testimony at the hearing were Ben L. Beets—T. 93-108—; Hubert C. Morgan, who had been defense counsel for Beets before the court-martial—T. 108-117—; Vernal W. Prewett, prosecuting officer before the court-martial—T. 117-131—; and James N. Foreman, who had investigated the charges prior to trial by court-martial.—T. 131-137. These men all testified for the petitioner, Ben L. Beets.

Respondent introduced photostatic copy of court-martial record, which included the pre-trial investigation, trial, and review opinions in the case of Ben L. Beets.—T. 92.

On the hearing of the motion for new trial April 7, 1948—T. 146-197—respondent produced in the Federal Court four of the seven officers constituting the court-martial, and they testified. Colonel Carl J. Rohsenberger—T. 158-167—; Sidney Strothner Smith, Jr.—T. 167-172—; Arthur K. Goldfinch—T. 172-177—; Claude Ball —T. 177-181. Also the Judge Advocate of the Third Armored Division, Harry Paul Wolfe—T. 181-188. Also the prosecuting officer, Prewett, testified further—T. 150-158.

On said hearing, the petitioner relied upon cross-examination of the above witnesses and three affidavits shown at T. 80-84.

The Court overruled the motions for new trial and to vacate judgment on December 30, 1948.—T. 85.

Notice of appeal was filed by Respondent February 24, 1949. Petitioner moved to dismiss the appeal as out of time, contending that in habeas corpus there is no mo-

tion for new trial and appeal time was not interrupted. Petition for Certiorari from the denial of the motion to dismiss was denied October 10, 1949. (94 L. ed. p. 46)

Case was argued before Court of Appeals November 7, 1949, and Opinion of the Court February 2, 1950.—T. 201.

Petitioner has now filed his Petition with the Judge Advocate General of the Army.

In discharging petitioner from custody, Judge Murrah ruled from the bench as shown at Transcript pages 138 to 140. In part, he said:

> "The trial of this case in the eyes of both the prosecution and the defense was wholly obnoxious and repulsive to their fundamental sense of justice, and that is the test by which this Court should judge it.
>
> "The Court has no difficulty in finding that this Court which tried this man was saturated with tyranny; that compliance with the Articles of War and with military justice was an empty and farcical compliance only, and the Court so finds from the facts and so holds as a matter of law."

Following this ruling, the Court made written Findings and Conclusions.—T. 20-24.

The Court found that petitioner had been denied counsel because the appointed defense counsel was burdened with a large number of cases and at no time prior to trial discussed with petitioner the facts pertaining to the case and made no preparation for petitioner's defense—T. 22—and because defense counsel had been censored for efforts towards defense of an accused, and held the opinion that courts-martial in that Division were not free to act and render impartial judgment.—T. 23.

The Court further found from the sworn testimony that the court-martial that tried this petitioner was not free to act and give justice according to recognized standards of fairness and impartiality.—T. 24.

A point of some considerable significance in the Findings and in the evidence in the habeas corpus case was that the complaining witness, Dr. Wilma Ley, did not identify this petitioner as a guilty party nor implicate him in any way prior to the trial. Fifty-eight days intervened between the alleged offense April 3, 1945, and the trial June 1, 1945. During that time this petitioner, Ben L. Beets, had faced Wilma Ley several times. At the pre-trial investigation conducted by Major James N. Foreman, this petitioner had questioned Wilma Ley.—T. 102. The alleged offense was at evening time—T. 97—and the first such view was the following morning when Wilma Ley picked the guard who had Beets in custody—T. 21, 95.

James N. Foreman testified:

"The Court: You say she did not identify the petitioner.

The Witness: No, sir.

The Court: Well, she did give you a sworn statement?

The Witness: Yes, sir.

The Court: In the sworn statement, did she implicate him?

The Witness: She did not."—T. 133.

Respondent has attempted to avoid this point by arguing that Beets was arrested at the scene of the alleged

rape, relying upon the Court-Martial Record of the testimony of the guard, Berg, who himself was picked by Wilma Ley. Contrary testimony in the habeas corpus case was not contradicted.

Beets testified:

> " *** Around 7 p. m. on April 3rd, another soldier and myself left the outpost of our Company, started to our quarters. After walking a short distance we was stopped by two soldiers by the names of Berg and Connolly. They pointed to a house nearby and asked if we had seen anyone coming out of this house. We told them no, and asked why. They said the house had been robbed and they thought that we was the ones that robbed it. This remark led to argument. Before the argument could be settled an officer drove up. One of the soldiers told him there had been some trouble in this house and he had saw Nanney and myself come out of it."—T. 94.

This failure of Wilma Ley to implicate petitioner prior to trial was not brought out before the court-martial. The members did not know about it. Failure to bring it out undoubtedly was due to the fact defense counsel did not consult with Beets until during the trial.—T. 98.

Lack of time and opportunity for defense counsel to consult and prepare prejudiced the petitioner, Ben L. Beets. Colonel Carl J. Rohsenberger, president and law member of the Beets court-martial, testified:

> "Q. How did you vote in the Beets case?
> A. Guilty, sir."—T. 162.
>
> • • • • •
>
> "Q. You say it did not come to your attention as a member of that court that she had never implicated Beets as one of the guilty parties?

A. Not that I recall; not to the best of my knowledge and belief."—T. 166.

* * * * *

"Q. Incidentally, would it have affected your opinion, do you think, if you had known that, as to the guilt or innocence?

A. Yes, sir; it certainly would."—T. 167.

There was testimony that courts-martial in the 3rd Armored Division were influenced by top officers in the Division. Colonel Rohsenberger—T. 160—and Captain Smith—T. 169—each told a specific instance of a court-martial being directed by the officer who appointed the court.

Captain Prewett, the prosecuting officer in the Beets case, testified that once a court-martial turned a man loose, and the whole court was reprimanded for it.—T. 125. On the motion for new trial, he said he believed the reprimand was for failure to impose the maximum penalty.—T. 152. He said there had been discussion among officers of the Division, backed up by a directive, that a convicted soldier might be transferred and restored to duty.—T. 121. Prior to the court-martial trial, he had told this petitioner that his trial would be for the record and if convicted, petitioner likely would be allowed to soldier back to duty.—T. 99.

Captain Morgan, appointed defense counsel for Beets, didn't consider himself competent to defend a capital case—T. 111. He had been threatened with court-martial himself because of defense efforts in a case.—T. 112. During the interval petitioner's case was pending, April 3 until the trial June 1, he defended "somewhere in the

vicinity of 100 cases, maybe by July it would run a hundred, a considerable number".—T. 109. Was very busy.—T. 110.

QUESTIONS INVOLVED.

Where a federal prisoner invokes the habeas corpus jurisdiction of a Federal Court and obtains a favorable judgment freeing him from imprisonment, can he be deprived of that judgment and deprived of his freedom because he had not invoked a temporary administrative remedy first a law and available to him months after rendition of the favorable judgment?

Under the circumstances described above, can the U. S. Court of Appeals, without ruling on the merits of the case, reverse the judgment, and relegate the prisoner to the administrative remedy?

In absence of statute permitting it, can the Judicial Power, properly and successfully invoked by a litigant, subordinate itself to the administrative remedy?

Habeas corpus is a constitutional and statutory remedy, and the statute commands that petitioner be disposed of as law and justice require. Federal statutes do not make the exhaustion of administrative remedy a prerequisite to right of hearing by the courts. Do the courts have power to impose such a condition as a prerequisite to habeas corpus?

In adopting a rule of convenience, can the Federal Courts act upon assumptions of fact and without evidence?

Are the Articles of War, and especially Article 53, unconstitutional?

Where habeas corpus judgment discharging petitioner was entered *January 22, 1948*, and appeal therefrom was filed *February 24, 1949*, did Court of Appeals have jurisdiction to do anything but dismiss the appeal? Did pendency of motion for new trial extend time for appeal?

REASONS FOR GRANTING WRIT.

Questions of wide import under the Constitution and Laws of the United States are present in this case.

Magnum Import Co. v. Coty, 262 U. S. 159.

The Court of Appeals interpreted Constitution and Statutes so as to take away from this petitioner the benefits of a favorable judgment and deprive him of personal liberty and property rights without ruling upon the merits of the case. This was usurpation of power and constituted judicial legislation, and suggests the desirability of review by the Supreme Court.

McNabb v. U. S., 318 U. S. 332, 340.
Ex Parte Watkins, 3 Pet. 193, 202; 7 L. ed. 650, 653.

The Court of Appeals, in adopting a rule of convenience as described in *Overfield v. Pennroad Corp.*, 113 F. 2d 6, 10, should be guided by known facts and should not act upon the basis of things assumed.

Kenedy v. Silas Mason, 333 U. S. 841.
Price v. Johnston, 334 U. S. 266, 291.

The Court of Appeals could not know the rush of petitions under Article 53 that will flood the office of the Judge Advocate General. Already, interested parties are advised by that Department that there is a back-log of such petitions pending. Any unusual delay in disposing of petitions under Article 53 will operate to nullify the constitutional provision that the writ of habeas corpus shall not be suspended and nullify as well the federal statutes which command that the federal courts dispose of the petitioner promptly and as law and justice require. The Court of Appeals was under a duty to rule upon the merits of the case, if it actually had jurisdiction.

Mutual Life Ins. Co. v. Krejci, 123 F. 2d 594.
American Automobile Ins. Co. v. Fruendt, 103 F. 2d 613, 615, 616.

The latter case cites *Rogers v. Guaranty Trust Company,* 288 U. S. 123, 130; 89 A. L. R. 720, which holds that the federal courts may decline to pass upon the merits and relegate litigants to another forum "whenever considerations of convenience, efficiency and justice" justify it.

This petitioner lives in Oklahoma and at expense and inconvenience obtained a favorable judgment in the federal courts near his home. It is of no convenience to him to be deprived of that judgment simply in order that he carry on further litigation and efforts in the District of Columbia. Furthermore, the Supreme Court in the *Rogers* case was distinguishing between federal and state courts, whereas petitioner, who claimed that his army trial was unfair and conducted in violation of the Con-

stitution, and was upheld in that claim by the Federal Court, is by the decision of the Court of Appeals, bereft of that judgment and relegated to the right to petition the very same authority that opposed him in the Federal District Court and in the Court of Appeals.

There is no statute that requires that a soldier imprisoned under court-martial sentence petition the Judge Advocate General before filing habeas corpus, other than the provision in Article 53 itself that the final action of the Judge Advocate General shall be binding upon the Courts. The habeas corpus statutes make no such requirement and the very purpose of the writ, protected by the Constitution, forbids such an interpretation.

Bowen v. Johnston, 306 U. S. 19, 26.

New Article of War 53 (10 U. S. C. 1525) is unconstitutional if the ruling of the Court of Appeals in this case stands, because such an interpretation operates to suspend the writ.

Const., Art. 1, Sec. 9,

and because it attempts to shut off access to the courts and denies due process,

Ex Parte Quirin, 317 U. S. 1,

and because it in effect denies all remedy because the Judge Advocate General's Corps is the very authority that opposed petitioner's habeas corpus case in the Federal District Court and in the Court of Appeals. That department is in effect the respondent in this case.

In the Federal Court, petitioner had means, Judicial Process, to obtain testimony.

The Supreme Court should not permit the lower Federal Courts to subordinate the great writ of Habeas Corpus to a temporary and uncertain administrative remedy.

Price v. Johnston, 334 U. S. 266, 282, 283.
McNally v. Hill, 293 U. S. 131.
Bowen v. Johnston, 306 U. S. 19, 26.
Humphrey v. Smith, 93 L. ed. 775.

The Articles of War are unconstitutional in their entirety. As stated in an affidavit used by this petitioner in opposition to the motion for new trial.

> "Furthermore, in my opinion it was common knowledge throughout the Division that the General Courts were dominated indirectly in all cases by the Commanding General who controlled the members of the Court in their assessments, their efficiency ratings, and recommendations for promotions, and such indirect domination and control is clearly reflected in my experience as Defense Counsel in defending some 85 cases in which only two acquittals were secured. *** Such indirect domination of the Courts generally made it a foregone conclusion that the conviction would be had and likewise ordinarily impelled the Court to assess the maximum punishment in order to afford the Commanding General opportunity to grant clemency if he so desired, but such clemency, in my opinion, if granted at all very seldom was of any particular substantial nature. In addition to such indirect domination it is my opinion that it was common knowledge in the Division that if the Courts did not assess the maximum penalty the Court would quite probably be subject to reprimand and censure as occurred on several occasions where the Court did not assess the maximum penalty, but a penalty less than the maximum allowed."—T. page 83.

The observations of Mr. Justice Taft in *Dugan v. Ohio*, 277 U. S. 61, describing the Supreme Court's decision in *Tumey v. Ohio*, 273 U. S. 510, 50 A. L. R. 1256, and the considerations which caused the Court there to hold there was Denial of Due Process, are most applicable here:

> "Another was that a defendant brought into court might with reason complain that he was not likely to get a fair trial or a fair sentence from a judge who as chief executive was responsible for the financial condition of the village, who could and did largely control the policy of setting up a liquor court in the village with attorneys, marshal and detectives under his supervision, and who by his interest as mayor might be tempted to accumulate from heavy fines a large fund by which the running expenses of a small village could be paid, improvements might be made and taxes reduced. This was thought not to be giving the defendant the benefit of due process of law." (p. 65)

Courts-Martial should be independent of Army Command.

Habeas corpus statutes do not provide for a motion for new trial and while there is conflict of decision on the point, we suggest that the motion for new trial did not prolong time for an appeal, and the Court of Appeals did not have jurisdiction to do anything but dismiss the appeal in petitioner's case.

Federal Rule, 81 (a) (2).
Holiday v. Johnston, 313 U. S. 342, 353.
Albert v. Patterson, 155 F. 2d 429.
Hunter v. Thomas, 173 F. 2d 810.

CONCLUSION.

Petitioner respectfully prays that the Honorable Court grant the writ and review this case.

Respectfully submitted,

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